Appendix A

The Commission's Notice and Comment Obligations

Any decision the Commission reaches on bill and keep would have to be grounded in the record before it. In fact, the extensive record that has been created, and the various proposals and arguments made by dozens of commenters during this extended process, have provided ample notice of almost any route the Commission could pursue with respect to reciprocal compensation for ISP traffic without further comment. The record would likely support a decision to apply bill and keep to a broader class of local traffic as well. While bill and keep for non-ISP traffic was not specifically the subject of the proceedings to date, several commenters *did* squarely propose bill and keep rules that covered non-ISPs as well as ISP traffic, and the Commission may reasonably conclude that parties had sufficient notice of such alternatives as well. Alternatively, the Commission could ask for a new round of comments specifically on the application of bill and keep to non-ISP traffic after it implements bill and keep for ISP dial-up traffic.

I. There Is No Need for Further Comments Before Applying Bill and Keep to ISP Traffic.

The Commission has provided more than adequate notice that it will decide whether ISP-bound traffic falls within section 251(b)(5) and what compensation model shall be applied to that traffic, and it has offered parties ample opportunities to comment on these matters. This record should support any basis for applying bill and keep to ISP traffic, regardless of the legal theory supporting that proposal. The Administrative Procedure Act requires that "[g]eneral notice of proposed rule making shall be published in the Federal Register" and that "[t]he notice shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). These "notice . . . requirements are met when" an agency's final rule "is the 'logical outgrowth' of the proposed rule." *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000) ("*Battery Recyclers*") (quoting *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991)).

> [T]he key focus is on whether the purposes of notice and comment have been adequately served. . . . [A] final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commenters with 'their first occasion to offer new and different criticisms which the agency might find convincing.'

Id. at 1059 (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1225 (D.C. Cir. 1980)).

As the D.C. Circuit has made clear, an agency may in fact legally adopt a rule that it never formally proposed in response to suggestions made in submitted comments. *Battery Recyclers*, 208 F.3d at 1059. *See also Sierra Club v. Costle*, 657 F.2d 298, 353-55 (D.C. Cir. 1981) ("*Sierra Club*"). This is particularly true where the record is well developed and parties have, in fact, commented on the matters in question. Complainants may not claim inadequate notice where they are unable to identify any "relevant information they might have supplied had they anticipated [the agency's] final rule." *Battery Recyclers*, 208 F.3d at 1059. For example, in *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637 (1st Cir. 1979) ("*BASF Wyandotte*"), the court rejected petitioner's claim that they were taken "entirely by surprise" by an EPA rule not specifically identified as an alternative in the initial NPRM. *Id.* at 643. The court explained that "[t]he essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan." *Id.* at 642. The NPRM is not determinative, since "[a]n agency's promulgation of proposed rules is not a guarantee that those rules will be changed only in the ways the targets of the rules suggest." *Id.* In particular, the court found noteworthy the fact that there was no basis for believing that commenters'

> comments would have differed fundamentally if they had known what EPA would do. Though they would have had a different proposition against which to argue, their proposed solutions would, presumably, have been the same for the same reasons. They might have responded in greater volume or more vociferously, but they have not shown us that the content of their criticisms would have been different to the point that they would have stood a better chance of convincing the Agency. . . . In short, they had a fair opportunity to present their views. . . . Their real complaint is that EPA rejected those views.

Id. at 644.

Under this standard, the Commission has provided sufficient notice that it might decide to regulate ISP-bound traffic under a bill and keep system. In its Declaratory Ruling, the Commission explained that it had "conclude[d] that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate," and sought comment on "an alternative proposal that we adopt a set of federal rules governing inter-carrier compensation for ISP-bound traffic pursuant to which parties would engage in negotiations concerning rates, terms, and conditions applicable to delivery of interstate ISP-bound traffic." *Reciprocal Compensation Declaratory Ruling*, 3689-90, 3708 ¶¶ 1, 31 (1999). The Commission subsequently sought "comment on the issues identified [in the *Bell Atlantic*] decision," including the court's stance that the Commission had not provided an adequate explanation for its treatment of ISP-bound calls as outside section 251(b)(5). Public Notice, *Comment Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling By the U.S. Court of Appeals for the D.C. Circuit*, 15 FCC Rcd 11311 (1999) ("*Public Notice*"). The Commission also sought "comment regarding any new or innovative inter-carrier compensation arrangements for ISP-bound traffic that parties may be considering or may have entered into, either voluntarily or at the direction of a state commission, during the pendency of this proceeding." *Id.* at 11312. The Commission thus specifically raised the question of new compensation mechanisms that might be adopted, and the issue was clearly made relevant both in the context of non-local treatment of ISP-bound traffic, and the context of revisiting entirely the applicability of section 251(b)(5) to ISP-bound traffic.

The comments filed in response to the Commission's notice and the significant *ex parte* record are evidence of its sufficiency. For example, SBC argued that ISP-bound traffic is not entitled to reciprocal compensation "irrespective of whether ISP traffic is classified as exchange access, telephone exchange service, or otherwise." Comments of SBC at 24. SBC then specifically suggested that the Commission adopt a bill and keep compensation system for ISP-bound traffic. *Id.* at 48-55. SBC explained in detail why it believes that bill and keep is less market distorting and more equitable than reciprocal compensation in these circumstances. *See also, e.g.*, Reply Comments of Qwest at 5-13.

Other Commenters specifically responded to this proposal. Focal Communications, for instance, expressly opposed bill and keep for ISP-bound traffic. "[S]everal parties urged the Commission either to eliminate reciprocal compensation for ISP traffic entirely in favor of a 'bill and keep' arrangement or, alternatively suggested that the burden of compensation rested on the ISP, not the originating carrier. The Commission should reject these arguments entirely." Comments of Focal at 17-18.[11/] Those opposing bill and keep for ISP-bound traffic advanced both economic and legal arguments.[12/] The arguments on both sides were fleshed out considerably in the *ex parte* record, as well.

11/ *See also, e.g.,* Comments of Pac-West at 16; Reply Comments of Pac-West at 22-23 (bill and keep should not apply to ISP traffic).

12/ *See, e.g.*, Comments of Pac-West at 19; Comments of Focal at 18-23; Reply Comments of Pac-West at 12-22.

The proposal to apply bill and keep regime to ISP traffic, even if that traffic were deemed to come within section 251(b)(5), fits squarely within this dialogue; indeed, it is difficult to envision what additional arguments commenters could make if the Commission were once again to place the issue before them with even more specific proposals. Moreover, as in *Sierra Club*, this public discussion provided additional actual notice that the Commission might act on the matters as proposed by commenters. While the precise legal arguments contained here may not have been discussed in these very terms, the same general legal and policy issues were raised.

For example, commenters have thoroughly considered the questions of what costs are actually related to termination, how high those costs are, and to whom they should properly be ascribed.[13/] Commenters also have fully argued the question of whether applying section 251(b)(5) to ISP-bound traffic creates inappropriate opportunities for regulatory arbitrage and disincentives to facilities-based competition.[14/] Likewise, the findings that would have to support a Commission decision to forbear in applying 251(b)(5) to ISP-bound traffic — whether the provision is "necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly discriminatory," and whether enforcement is necessary to protect consumers and the public interest. 47 U.S.C. § 160(a) — have all been fully vetted.[15/] As the court noted in *BASF Wyandotte*, one "cannot think how [the] comments would have differed fundamentally if [commenters] had known" the specific conclusions the Commission

---

13/ *See, e.g.*, Comments of SBC at 28-37; Comments of Qwest at 13-18; Comments of Verizon at 22-27; Comments of Focal at 18-20; Comments of Pac-West at 19-20.

14/ *See, e.g.*, Comments of SBC at 39-47, 51- 53; Comments of Pac-West at 19; Comments of Focal at 18-23; Reply Comments of SBC at 37-38; Reply Comments of Qwest at 12; Reply Comments of Pac-West at 12-22.

15/ *See generally, e.g.*, Comments of SBC; Comments of U S WEST; Comments of Pac-West; Comments of Focal; Reply Comments of SBC; Reply Comments of Qwest; Reply Comments of Pac-West.

was going to draw based on the record before it. *BASF Wyandotte*, 598 F.2d at 644. Under these circumstances, the Commission is fully justified in promulgating any of our suggested methods of imposing bill and keep on ISP-bound traffic.

II. <u>The Current Record Supports Applying Bill and Keep to Non-ISP Traffic.</u>

Although the proceedings below have focused primarily on the treatment of ISP-bound traffic, the broader question whether local traffic generally should be subject to bill and keep was introduced as well. For example, commenters suggested to the Commission that ISP and general local traffic could be brought "together into a single bill-and-keep regime." Reply Comments of Qwest at 12. *See also* Comments of SBC at 51-53; Reply Comments of SBC at 37-38 (proposing bill and keep for local traffic); as noted above, these issues haven been significantly amplified in the *ex parte* record. Parties have accordingly had ample opportunity to comment on the idea of a broader bill and keep rule. Thus, as set forth above, the Commission could reasonably conclude that it need not take more comments before applying bill and keep to all local traffic.

Nonetheless, should the Commission conclude that further comment would be preferable, it could address ISP and non-ISP traffic separately, and have a further round of comments just on the latter. If the Commission proceeds in this manner, it might consider immediately adopting an interim order imposing bill and keep (or establishing a rebuttable presumption that bill and keep is appropriate) during the pendency of its further round of comment, and providing for a true-up if it ultimately rejected the bill and keep approach. Alternatively, it could simply leave existing interconnection arrangements for non-ISP traffic in place pending completion of any rulemaking.

Appendix B

The Precise Contours of Bill and Keep

Although the Commission is currently focusing on whether it can bring Internet-bound traffic under a more comprehensive bill and keep rule, the Commission should also consider what types of *non*-ISP traffic would be brought under the rule. A sweeping bill and keep rule covering *all* exchange traffic without exception would create some undesirable effects and discourage the construction of network facilities. This section briefly outlines some limitations the Commission should consider before adopting a final bill and keep rule for non-ISP traffic.

I. Exclude CMRS Traffic from Bill and Keep.

The Commission should consider whether to exclude wireline-CMRS interconnection from any bill and keep rule, and it has a strong basis for doing so. As noted above, the existing traffic imbalances between carriers with respect to ISP dial-up traffic are entirely an artifact of current regulations. Once the regulatory incentives to cherry-pick ISP customers and shun residential subscribers are gone, one would expect the distribution of ISPs among LECs to become more even, and bill and keep would not result in any LEC unfairly bearing a disproportionate share of unrecovered termination costs. On the other hand, the traffic imbalances between wireline and wireless carriers are very real. As a result of network costs, pricing policies, and differences in customers' calling habits, wireline LECs currently terminate a far greater proportion of traffic than CMRS carriers do. CMRS carriers do deserve and are receiving reciprocal compensation for the calls they in fact terminate, but they also do generate significant amounts of traffic that is terminated by wireline LECs. While the imbalances persist, the Commission may find it appropriate to leave existing reciprocal compensation arrangements in place.

II. Exclude Transiting Traffic from Bill and Keep.

The Commission should likewise acknowledge that a pure bill and keep rule does not work where *three* LECs are involved — that is, where two LECs exchange local traffic with each other indirectly by routing that traffic over a third carrier. A pure bill and keep regime fails to compensate that third (intermediary) carrier for its costs of transporting the transiting traffic that originates on the other two LECs' networks, since the intermediary carrier in this scenario has no "customer" and thus receives no compensation for its transport of the call. Moreover, if the true originating and terminating LECs are permitted to receive transiting traffic for free, they have no incentive to expand their networks and build direct interconnection points with each other; it is cheaper for them to dump all of their traffic onto the intermediary's network and saddle that LEC with all the costs of transport.

The Commission should therefore allow LECs to continue charging each other for delivering transiting traffic that originates on the networks of other carriers. This is a widespread and accepted practice incorporated into almost all interconnection agreements today, and disturbing it would be immensely and unnecessarily disruptive. The Commission has repeatedly held that transiting traffic should be kept out of the section 251(b)(5) reciprocal compensation regime, most recently in its *TSR Wireless* decision. *See* Memorandum Opinion and Order, *TSR Wireless, LLC v. U S WEST Communications, Inc.*, 15 FCC Rcd 11166 n.70 (2000) (reaffirming that paging companies are required to pay for transiting traffic, notwithstanding the Commission's rules implementing 47 U.S.C. § 251(b)(5)); *see also Local Competition Order*, 11 FCC Rcd at 16016-17 ¶¶ 1041-1043 (stating intent to continue treating transit traffic arising from

CMRS roaming under access charge regime, not reciprocal compensation rules). The Commission should not disturb that settled industry-wide practice now.[16]

[16] Moreover, the Act does not require the Commission to include transiting traffic in any general bill and keep rule. The reciprocal compensation provisions of the Act do not address the three-LEC situation; section 252(d)(2), for example, addresses only the case where two carriers have a bilateral arrangement governing the "recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls *that originate on the network facilities of the other carrier*." 47 U.S.C. § 252(d)(2)(A)(i) (emphasis added). And the Commission itself has recognized that "reciprocal compensation for transport and termination of calls is intended for a situation in which *two* carriers collaborate to complete a local call." *Local Competition Order*, 11 FCC Rcd at 16013 ¶ 1034 (emphasis added).